No. 437

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

OTTO V. BURNETT,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

ROY W. SHORT
310 Second National Bldg.
Cincinnati, Ohio
Attorney for Respondent

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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TO the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

QUESTIONS PRESENTED

The Questions are twofold and may more accurately be stated as to first, whether the limitation period provided

in the Federal Employers' Liability Act (45 U.S.C.A. Section 56), is procedural or substantive.

Secondly, whether the Ohio Savings Statute (Ohio Revised Code 2305.19) extends the three-year limitation period provided in the Federal Act where the delay in filing was not occasioned either by facts beyond the control of the parties or by the conduct of the defendant-respondent.

STATEMENT OF THE CASE

Those facts contained in the first two paragraphs of Petitioner's "statement" (page 3 of Brief), are substantially correct and disclose that a timely and proper filing was not prevented by either a situation beyond the control of the plaintiff, such as existence of a state of war or by the conduct of the defendant respondent, such as fraud.

HOW FEDERAL QUESTION IS PRESENTED

Petitioner's Complaint filed in the District Court alleged a cause of action under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. The decisions of both federal Courts were accurately based upon and correctly interpreted the substantive limitation period under said Act. 45 U.S.C. § 56.

ARGUMENT

Petitioner concedes that the American courts prior to 1947 uniformly held that statutory actions generally and the Federal Employers Liability Act (45 U.S.C.A. Section 56) in particular, could not be tolled for any reason even for fraud or concealment. He attempts to avoid these cases and the principles therein contained. He proceeds with diligence but without an understanding of the precise meaning of the cases on which he relies.

Petitioner places great reliance on the case of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). This merely holds that where a defendant is guilty of fraud he is estopped from setting up the statute of limitations to effectively bar the plaintiff's claim. This case does not hold that the statute of limitations as contained in Section 56 may be tolled at all, but rather that equity will and must hold "that no man may take advantage of his own wrong."

This is the precise holding of the other cases relied upon by the petitioner, namely *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253 (4th Cir., 1949) cert. den. 339 U.S. 919 (1950); *Fravel* v. *Pennsylvania R. Co.*, 104 F.S. 84 (1952); *Toran* v. *New York, N. Y. and H. R. Co.*, 108 F.S. 564 (1952) and *Central of Georgia Railway Company* v. *Ramsey*, 151 So. 2d 725, Ala. (1963), *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (1962), *Westinghouse Electric Corp.* v. *Pacific Gas and Electric Co.*, 326 F. 2d 575 (CA-9, 1964), *Goldlawr* v. *Heiman*, 369 U.S. 463 (1962); *Gaines* v. *City of New York*, 215 N.Y. 533.

The United States Court of Appeals for the Sixth Circuit in affirming the District Court in the instant case (opinion contained in Appendix B, Page 4A of petition), commented that the *Glus* case according to the Tennessee Court had executed a change in the rule of the earlier cases, agreeing that the rule may have been changed with respect to cases involving fraud. This court found nothing in the *Glus* case overruling previous cases holding that the limitation in the act was substantive and not procedural. In short, the facts of the *Glus* case were not applicable.

The state court case of *Breneman* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 346 S.W. 2d 273 (1961) does not aid the petitioner for several reasons. In *Breneman* the defendant's doctor "misadvised" the plaintiff as

to the extent of his injuries and the course they might take. Thus as in *Glus* and the other "fraud" cases the plaintiff had been misled by the defendant. Secondly, in *Breneman* plaintiff was seeking in effect to reinstate his action which had originally been commenced within the statutory period. When *Breneman* is considered on its own facts it merely represents another example of the exercise of the Court's equitable jurisdiction. Thirdly, the conclusion expressed as to the present state of federal law is not supported by presently existing decisions.

The other cases relied upon by the petitioner, *Frabutt* v. *New York, C. & St. L. R. Co.*, 84 F.S. 460 (1949) and *Osbourne* v. *United States*, 164 F. 2d 767 (2d Cir., 1947) are similar to the estoppel cases and might be referred to as war cases. In both the plaintiffs were prevented from bringing their action within time by reason of something over which they had no control — war.

Unlike the situation in the cases cited by petitioner there were no extenuating circumstances in the instant case which excused him from compliance with the three year limitation. There was no fraud. There was no war.

No act of the respondent induced the petitioner to follow the course he took. He filed his action first in the State Court and not in a Federal Court for reasons best known to himself but the choice of the place and filing was exclusively in his control.

The Federal Employers' Liability Act (45 U.S.C.A. Sec. 56) established a new right of action, unknown to the common law. Petitioner sought to avail himself of the advantages of that act. An integral and substantive provision of that act requires the proper commencement of an action within three years from the day the cause accrued. Having failed to meet that requirement the plaintiff is precluded from maintaining his action. The limitation of that act being substantive in nature, it cannot be ex-

tended by the savings clause of the Ohio statute. A state statute cannot recreate a right which has ceased to exist by the terms of the Federal statute creating it.

In *Bell* v. *Wabash Ry. Co.*, 58 Fed. 2d 569 (8th Cir., 1932) the Court said at page 571:

> "An act of Congress, which at the same time, and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions as to the liability itself. Such an act is not a statute of limitations and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates . . . ' because such limitations are conditions of the liability itself and not limitations of the remedy only.
>
> "In *Atlantic Coastline Railroad* v. *Burnette*, 239 U.S. 200: 36 S. Ct. 75, 76: 60 L. Ed. 226, the Supreme Court discusses this 2 year provision imposed by said Section 6, and says 'It would seem a miscarriage of justice if the plaintiff should recover upon the statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time. It was there held that the action not having been brought within 2 years, it must fail in the courts of a state as well as in those of the United States.' "

This principle that compliance with the time limitation provided in the Federal Employers' Liability Act is a condition precedent and that the limitation relates, not merely to the remedy, but to the right is followed in *American Railroad Company of Porto Rico* v. *Coronas*, 230 Fed. 545; *Reading Co.* v. *Koons, Admr.*, 271 U.S. 58; *Wichita Falls and S. R. Co.* v. *Durham* (1938), 120 S.W. 2d 803; and *Macris* v. *Sociedad Maritima San Nicolas S. A.* (1959), 271 Fed. 2d 956, certiorari denied, March 28, 1960, 80 S. Ct. 757, 362 U.S. 935, 4 L. Ed. 2d 747.

CONCLUSION

The cases tolling a federal statute of limitations where the plaintiff was prevented from filing his suit in a timely and proper manner because of war, fraud, or misrepresentation reflect justice in our federal courts. In this case no such situation existed. One of the fundamental purposes of the Statute of Limitations is to protect a potential defendant from suit on a claim arising years previously and being confronted with attendant problems of investigation, location of witnesses, refuting injuries now healed, etc.

Certainly, a citizen should have his day in court and our Congress saw fit to give a plaintiff, in this case, Otto V. Burnett, under the Federal Employers' Liability Act the benefit of approximately 1,095 days to avail himself of such right. Again, for some unknown reason or reasons this plaintiff waited until five days before the three year period expired to attempt to commence his action.

Bearing in mind that this is a federal law and one in which an inherent purpose is to establish a uniform cause of action to apply in a uniform manner to all citizens of all states, we respectfully submit that under the facts of this case to permit a state statute to toll the federal limitation would result in a Georgia litigant having three years and six months to properly bring his action under such FELA; an Indiana litigant, three years plus five more years; Kansas, three years plus six months; Kentucky, three years plus ninety days; Maryland, only three years as no saving statute exists; Michigan three years plus ninety days, and so on. We further submit that if this was the intention of Congress, provisions for such application could and would have been set forth in the Act.

The United States Court of Appeals for the Sixth Circuit in reaching its decision followed the existing law. It

properly followed the decisions in those cases precisely in point with the issues involved and properly distinguished those cases asserted by the petitioner involving fraud, war, etc. and having no application to the real issues. The petition for a writ of certiorari should be denied and the ruling of the United States Court of Appeals for the Sixth Circuit affirmed.

Respectfully submitted,

ROY W. SHORT
310 Second National Bldg.
Cincinnati, Ohio 45202
Attorney for Respondent